91-790

Nos. 91-970 and 91-1206

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

CSX TRANSPORTATION, INC.,
Petitioner,

v.

LIZZIE BEATRICE EASTERWOOD,
Respondent.

LIZZIE BEATRICE EASTERWOOD,
Cross-Petitioner,

v.

CSX TRANSPORTATION, INC.,
Cross-Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF FOR THE RAILWAY LABOR EXECUTIVES' ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

LAWRENCE M. MANN
STEVEN M. WEISBAUM
ALPER & MANN, P.C.
400 N. Capitol Street, N.W.
Suite 851
Washington, D.C. 20001
(202) 298-9191

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QUESTION PRESENTED

1. Whether federal statutes and regulations relating to the uniformity and financing of grade crossing signals, promulgated pursuant to the Federal Highway Safety Act and Federal-Aid Highway Act, preempt state common-law requirement that railroads maintain safe grade crossings?

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BRIEF FOR THE RAILWAY LABOR EXECUTIVES' ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

This brief is submitted by the Railway Labor Executives' Association on behalf of the respondent/cross-petitioner, Lizzie Beatrice Easterwood.

STATEMENT OF THE CASE

Thomas Easterwood, the husband of cross-petitioner Lizzie Beatrice Easterwood, was killed at a grade crossing on February 24, 1988 when the truck that he was driving was struck by a locomotive operated by CSX Transportation, Inc. Mr. Easterwood was one of 652 grade crossing fatalities in 1988. In that year alone there were 6,025 grade crossing accidents resulting in 3,069 casualties. NTSB *Rail-Highway Crossing Incident and Inventory Bulletin*, No. 11, Calendar Year 1988, (June 1989). The hazards associated with grade crossings are nationwide in scope, with crossing accidents totaling 5,350 in 1991. Grade crossing accidents have historically been, and continue to be the single largest cause of railroad related deaths in this country.

SUMMARY OF THE ARGUMENT

Despite the foregoing, the federal government has failed to enact any meaningful regulations addressing the national hazard created by grade crossings. The federal government's inaction was most recently addressed on September 3, 1992, with the signing into law of 45 U.S.C. § 431(q), P.L. 102-365, directing that the Secretary of Transportation (hereinafter "Secretary") "shall . . . issue such rules regulations orders and standards to ensure the safe maintenance, inspection and testing of signal systems and devices at railroad highway grade crossings." Federal Railroad Safety Act of 1970, Pub. L. 91-548 (codified as amended, 45 U.S.C. § 431(q), P.L. 102-365) (hereinafter "FRSA"). This most recent amendment removed the language "as may be necessary" taking from the Secretary any discretion with respect to the promulgation of said regulations, thus compelling the Secretary to take action to address the grade crossing problem.

Despite the Secretary's inaction in relation to the safety aspects of the grade crossing problem, the Secretary has

promulgated regulations for the distribution of federal funds to states, pursuant to his authority under the Federal-Aid Highway Act of 1973, Pub. L. No. 93-87, 87 Stat. 280 (codified as amended at 23 U.S.C. § 130), and the Federal Highway Act, ch. 241, 39 Stat. 535. The Secretary's limited response to the grade crossing problem was accurately explained by the Eleventh Circuit in *Easterwood v CSX Transportation, Inc.*, 933 F.2d 1548, 1555 (11th Cir. 1991). The Court noted that

> While the legislative history of the Federal Railroad Safety Act evinces a strong concern about the hundreds of annual deaths in grade crossing accidents, neither the Act nor the regulations specifically address the problem through federal regulation of the signals and the design of grade crossings. The Act requires the Secretary . . . only to study problems with existing grade crossings and to create grade crossing demonstration projects. Moreover, the Secretary . . . has not promulgated any regulations regarding grade crossings under his general power to regulate railroad safety.

Regarding the petitioner's claims that 23 U.S.C. § 130 preempts state common law, the Eleventh Circuit noted that the regulations in question merely require the states to survey all of the grade crossings and to formulate a schedule of possible projects. 933 F.2d at 1555. Once the states have done so, the states would be able to use federal funds to bring said devices into compliance with the standards set forth in the Manual on Uniform Traffic Control Devices for Streets and Highways (23 C.F.R. § 655.601 (1981), hereinafter "MUTCD").

Under the guise of promoting national uniformity of safety regulations, railroads such as petitioners herein, have argued that regulations promulgated under 23 U.S.C. § 130 trigger the express preemption clause, 45 U.S.C. § 434, of the FRSA. Further, the railroads have sought to apply preemption not only to preclude state

statutory claims, but to preclude state common law claims as well. The broad reading of the FRSA's preemptive scope proposed herein by the petitioner flies in the face of justice and common sense. The petitioner is seeking to prevent the individual states from protecting their citizens from a hazard which has gone virtually unchecked by federal regulatory authorities. By petitioner's reasoning, the mere availability of federal funds for the purpose of upgrading existing crossings would preempt state common law and hold harmless all railroads regardless of their degree of negligence in conducting operations. In light of the already obvious hazard posed by grade crossings, the petitioner's attempt to cut free of the last vestiges of accountability for the hazards posed by their operation is impermissible.

The history of the FRSA reveals congressional intent to limit the preemptive scope of the federal legislation, particularly in situations where state law was in place to fill regulatory gaps. State common law has traditionally served just such a purpose. The railroads are attempting in the nation's courtrooms, to broaden the field of federal laws which would preempt state law claims, and further are attempting to broaden the field of state law actions which would be preempted, in violation of both the letter and the intent of the FRSA.

ARGUMENT

I. THE PREEMPTIVE SCOPE OF SECTION 434 OF THE FEDERAL RAILROAD SAFETY ACT DOES NOT EXTEND TO STATE COMMON LAW ACTIONS, AND ITS APPLICATION IS LIMITED TO REGULATIONS ENACTED PURSUANT TO THAT ACT

A. 45 U.S.C. § 434 Expressly Preempts State Regulation of Any Subject Matter Regulated by the Secretary

Section 434 of the FRSA governs the preemptive scope of federal regulations over state regulations, with respect to matters of railroad safety. According to § 434:

> The Congress declares that laws, rules, regulations, orders, and standards relating to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force any law, rule regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement. A State may adopt or continue in force an additional or more stringent law, rule, regulation, order, or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with any Federal law, rule, regulation, order, or standard, and when not creating an undue burden on interstate commerce.

Pursuant to § 434, where the federal government has regulated a particular "subject matter," states are preempted from enacting their own regulations with regard to that same subject matter. Section 433(b) of the FRSA expressly directed the Secretary to study the grade crossing problem and recommend solutions thereto.

> [T]he Secretary shall, insofar as practicable, *under the authority provided by this subchapter* and pursuant to his authority over highway, traffic, and

> motor vehicle safety, and highway construction, *undertake a coordinated effort toward the objective of developing and implementing solutions to the grade crossing problem*, as well as measures to protect pedestrians in densely populated areas along railroad rights-of-way.

(emphasis added). Despite this directive the Secretary took no affirmative action to address the grade crossing problem for over twenty years. The recent amendment of the FRSA, *supra* at 1, states in no uncertain terms that the Secretary shall take action, as directed over twenty years earlier. 45 U.S.C. § 431(q), P.L. 102-365.

B. Federal Courts Have Adopted Differing Interpretations of Both the Scope and the Application of § 434

In the case of *Marshall v. Burlington, Northern, Inc.*, 720 F.2d 1149, 19954 (9th Cir. 1983), the United States Court of Appeals for the Ninth Circuit interpreted § 434 of the FRSA, concluding that the Secretary had delegated authority to regulate grade crossings to local agencies pursuant to the Highway Safety Act of 1966, Pub. L. No. 89-564, 80 Stat. 731 (1966) (as amended, codified at 23 U.S.C. §§ 401-404 (1982)). The Highway Safety Act directs the Secretary to develop uniform safety programs, thereby making states eligible to receive federal financial assistance. Furthermore, the *Marshall* court reasoned that, because the MUTCD prescribes that the selection of devices, and the decision to use federal funds for upgrading those crossings are made by local agencies with jurisdiction over the crossing, the Secretary has thereby delegated federal authority to regulate grade crossings to local agencies. 720 F.2d at 1154. The court reasoned that any application of the MUTCD by state authorities was tantamount to federal action and as such, preempted application of state common law to grade crossings. The Court reached this conclusion despite the fact that the MUTCD was actually adopted by the Federal Highway Administration under provisions of the Federal-Aid Highway Act and Federal Highway Safety Act, and was meant to provide a means by which states could obtain federal funds, part of which were earmarked to eliminate grade crossing hazards. Although the *Marshall* court ultimately concluded that state common law was not preempted in that case, the court indicated that once a federal decision is reached through the local agency regarding the adequacy of the warning devices at the crossing, the railroad's duty under state common law would be preempted. *Id.*

The Eighth Circuit addressed a state common law claim alleging negligent failure to provide adequate warning devices in *Karl v. Burlington, Northern Railuroad Co.*, 880 F.2d 68 (8th Cir. 1989). The railroad, again relying on the fact that the Secretary had delegated authority to state agencies to regulate crossings pursuant to the MUTCD, argued that the local authorities had approved the device in question, thus relieving the railroad of its duty, and preempting common law negligence claims. The railroad contended, as it had in *Marshall*, that since federal law grants to the Secretary the power to regulate grade crossings, and since the local agency had approved the warning device, the approval should preempt claims based on common law negligence. 880 F.2d at 76.

The *Karl* court explicitly recognized the railroad's claim of preemption as one based on 45 U.S.C. §§ 433, 434. *Id.*[1] Citing *Runkle v. Burlington Northern*, 188 Mont. 286, 299-300, 613 P.2d 982, 990-91 (1980), the *Karl*

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[1] Contrary to the suggestion of petitioner, the 8th Circuit was clearly interpreting the preemptive scope of § 434, as indicated in the footnote at the outset of its discussion of the preemption issue. The court noted that "Burlington Northern specifically argues that the Federal Highway Safety Act, 23 U.S.C. § 402 (1982), and the Federal Railroad Safety Act, 45 U.S.C. §§ 433, 434 (1982), preempt Karl's common law negligence claims." 880 F.2d at 76, n.7.

court held that although the Federal-Aid Highway Act of 1973 represented an effort by the federal government to improve the safety of grade crossings, *it did not lessen the duty of a railroad to maintain a good and safe crossing. Id.* (emphasis added).

The case from which the petitions were sought herein involved two claims of negligence against CSX Transportation, petitioner herein. The respondent, plaintiff therein, brought suit contending that the railroad was negligent in failing to install automatic gates and warning devices at the crossing and for exceeding a reasonable speed. *Easterwood v. CSX Transportation, Inc.*, 933 F.2d 1548 (11th Cir. 1991).

Addressing the plaintiff's claim regarding the adequacy of the crossing warnings, the Court found that "[T]he Secretary has not promulgated any regulations regarding grade crossings under his general power to regulate railroad safety." The Court then addressed the CSX claim that the Federal-Aid Highways Act preempts all state law. The Court noted that "as opposed to the Federal Railroad Safety Act . . . [§ 130(d) of the Federal-Aid Highways] contains no explicit provision preempting contrary or similar law." 933 F.2d at 1555. The Court also noted that the regulations relied on by the petitioners were not so pervasive as to invoke preemption by implication. *Id.* Finally, the Court added that "since the allegedly pre-empted field includes the preemption of state tort law, an area of traditional state interest, the court would have to find a clear and manifest congressional intent in order to imply preemption." *Id.*, n.4.

The Court concluded that

> because the state has neither upgraded the grade crossing nor affirmatively decided that existing crossing was adequate, we have no occasion to decide whether a federally sponsored upgrade would insulate the railroad from [common law] liability. We do hold that, in the absence of a decision by a federally designated policymaker, state common-law liabilities are not affected by the federal highway aid provisions.

Id. at 1556. Although the lower court failed to address whether a federally sponsored upgrade would insulate the railroad from common law liability, the Court did note that in light of the preceding analysis, it had reservations about the holding in *Marshall* which imputed secretarial action to a state agency's consideration of a crossing for the receipt of federal funds. *Id.* at 1555, n.5.

The reading of § 434 supported by petitioner herein is in absolute conflict with the FRSA's primary goal of railroad safety, and is not a rational application of the term "until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement." The petitioner's reading of § 434 would allow the federal government to preempt state law whenever states consider the use of federal funds earmarked for some "subject matter." As in the present case, the federal agency need not even control the spending of said funds. The implausible result is that the States would forevermore preempt their own common law cause of action as to those crossings, merely by *considering* whether to use federal funds for grade crossing improvements. To view the state's consideration as tantamount to the Secretary's adoption of a rule, regulation, order, or standard covering the subject matter of such state requirement, and conclude State common law is thereby preempted is inconsistent with any reasonable interpretation of either the letter or the intent of the FRSA.[2]

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[2] The scope of § 203 of the Federal Highway Act is limited to the federal financing of grade crossings. Furthermore, the safety implications are so attenuated as to make them virtually ineffective to that end. The New York Times reported in a recent article that the State of Texas alone has, as of the printing of the article, 13,582 grade crossings. According to the article, it would take 120 years

C. Congress Intended, With the Enactment of The Federal Railway Safety Act, to Create a Partnership Between Federal and State Lawmakers in Furtherance of Rail Safety

Although § 434 of the FRSA begins with a general statement of intent to promote nationally uniform laws and standards relating to railroad safety "to the extent practicable," the section goes on, in a more specific way, to direct that states shall retain the power to regulate areas of rail safety "[U]ntil such time as the Secretary has adopted a rule, regulation, order or standard covering the subject matter of such State requirement." 45 U.S.C. § 434. The language of § 434 could not be more clear regarding its intent to allow continued state involvement in the regulation of railroad safety. Indeed, the drafters' desire for national uniformity of safety laws was limited with the words "to the extent practicable," removing any doubt that the primary purpose of the FRSA was railroad safety. To read § 434's general goal of uniformity to the extent practicable, as the determining factor when deciding whether subject matter has been covered by a federal regulation, undermines the FRSA's primary goal of safety, and amounts to an usurpation of the FRSA's specific goal of railroad safety by its general desire for uniformity.

1. *Congress Intended That States Have Authority To Regulate Railroad Safety*

The language of the FRSA and its legislative history make it clear that Congress did not intend § 434 to operate as a bar to continued state regulation of railroad safety absent specific federal regulatory authority.[3] The FRSA provides, *inter alia* that the Secretary of Transportation shall have jurisdiction over all areas of railroad

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for the state of Texas alone to address the grade crossing problem within the scope of § 203.

[3] *See Napier v. Atlantic Coast Line R.R. Co.*, 272 U.S. 605 (1926).

safety. Along with the broad authority delegated to the Secretary, Congress specifically authorized state regulation of railroad safety.

The genesis of the FRSA was in 1968 with the introduction of H.R. 16980, a bill drafted by the Secretary of Transportation. (*See Hearings on H.R. 16980 Before the House Committee on Interstate and Foreign Committee*, 90th Cong. 2d Sess. 1-6, Serial No. 90-39 (1968)). Section 4 of that bill would have eliminated all state laws after two years, with the exception of four separate areas. No further action was taken by Congress in the 90th Congress.

On April 18, 1969, the Secretary of Transportation created a Task Force on railroad safety comprised of representatives from the Federal Railroad Administration, the state regulatory commissions, the railroads, and the railroad unions. The Report of the Task Force was submitted to the Secretary on June 30, 1969. On the preemption issue the Report provided that "Existing State rail safety statutes and regulations remain in full force until and unless preempted by Federal regulation." Subsequent to the Report the interested parties together attempted to draft a proposed bill for Congressional consideration in the 91st Congress. Regarding preemption, the bill drafted by the Federal Railroad Administration was not acceptable to either labor or the state commissions. Even in the section-by-section analysis of the Administration's bill by the Secretary, which was introduced as S. 3061 and H.R. 14417, the Secretary recognized that the states would not be preempted ". . . unless the Secretary prescribed federal safety standards covering the subject matter of the *particular* state or local safety requirements. . . ." (emphasis added).

The preemptive language of S. 3061 and H.R. 14417 as introduced provided:

> SEC. 5. State or local laws, rules, regulations, or standards relating to railroad safety in effect on the date of enactment of this Act, shall remain in effect unless the Secretary shall have prescribed rules, regulations, or standards covering the subject matter of the State or local laws, regulations or standards.

Section 5 above was revised and incorporated into the compromise legislation reported by both Senate and House Committees, and ultimately passed by Congress in S. 1933. In testifying on the proposed bills, then Secretary of Transportation Volpe discussed S. 1933 as passed by the Senate and pointed out the areas of permissible state jurisdiction over railroad safety. The relevant portion of the testimony states:

> *To avoid a lapse in regulation*, Federal or State, after a Federal safety bill has been passed, section 105 provides that the *states may adopt or continue in force any law, rule, regulation, or standard relating to railroad safety until the Secretary has promulgated a specific rule, regulation or standard covering the subject matter of the state requirement. This prevents the mere enactment of a broad authorizing Federal statute from preempting the field and making void the specific rules and regulations of the states.* Therefore, until the Secretary has promulgated his own *specific* rules and regulations in these areas, state requirements will remain in effect. This would be so whether such state requirements were in effect on or after the date of enactment of the Federal statute. . . .

Hearings Before the Subcomm. on Transp. and Aeronautics of the Comm. on Interstate and Foreign Commerce on H.R. 7068, H.R. 11417, and H.R. 14478 (and similar bills), S. 1933, 91st Cong., 2d Sess., Ser. No. 91-51, p. 29 (1970) (emphasis added).[4] Rep. Jake Pickle testified as follows:

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[4] Section 105 of the Senate bill S. 1933, as reported, and section 205 of the House bill, as reported, are incorporated into 45 U.S.C. § 434.

> Contrary to some speculation that this version of the Railroad Safety Act cuts across State jurisdictions, *the States can still take action* in three methods. First, the State can continue and initiate legislation in areas of safety not coveerd by Federal regulations. . . . As an important adjunct, for the first time, the *States are clearly given the power to initiate legislation in areas which have not been touched by these [federal] regulations* and these State legislative efforts will remain in effect unless and until such time that the Federal Government institutes its own regulations. *This is an important advance and recognition of State governments.*

116 Cong. Rec. 27613 (August 6, 1970) (emphasis added).

The Senate Report provided further support for the authority of the state to regulate railroad safety:

> . . . this section [105] preserves from Federal preemption *two types of State power.* First, the States may continue to regulate with respect to that subject matter which is not covered by rules, regulations, or standards issued by the Secretary. All State requirements will remain in effect until preempted by federal action concerning the *same* subject matter.

S. Rep. No. 91-619, 91st Cong., 1st Sess. 8-9 (emphasis added).

The House Report stated:

> Section 205 of the bill declares that it is the policy of Congress that rail safety regulations be nationally uniform to the extent practicable. It provides, however, that until the Secretary acts with respect to a particular subject matter, a State may continue to regulate in that area. *Once the Secretary has prescribed a uniform national standard the State would no longer have authority to establish Statewide standards with respect to rail safety.*

H.R. Rep. No. 91-1194, 91st Cong., 1st Sess. p. 19 (1970) (emphasis added).

While it is true that Congress wanted national uniformity in rail safety to the extent practicable, the explicit authorization of state regulation in 45 U.S.C. § 434 was a countervailing concern to its desire for national uniformity. *See* House Report No. 91-114, U.S. Code Cong. and Admin. News, 91st Cong (1970) p. 4116 (hereinafter "House Report"): "[Section 205] provides, however, that until the Secretary acts with respect to a particular matter, a State may continue to regulate in that area." As stated in Senate Report,

> the committee recognizes the State concern for railroad safety in some areas. Accordingly, this section preserves from Federal preemption two types of State power. First, the States may continue to regulate with respect to that subject matter which is not covered by rules, regulations, or standards issued by the Secretary. All State requirements will remain in effect until preempted by federal action concerning the same subject matter.

S. Rep. No. 91-619, 91st Cong., 1st Sess. 8-9 (1969). Regarding issues of rail safety, Congress has "unmistakably ordained" that states can regulate rail safety. *See Florida Lime & Avocado Growers v. Paul*, 373 U.S. 132, 142 (1963).

As Congress has explicitly stated, the FRSA as adopted "prevents the mere enactment of a broad authorizing Federal statute from preempting the field and making void the specific rules and regulations of the state." *Supra* at 12. It cannot be said, therefore, that the adoption of federal regulations which merely address a subject matter circuitously, as in the case of the Federal-Aid Highway and Federal Highway Safety Act, are intended to preempt state railroad safety regulations, much less to preempt state common law protection. Only where FRA has enacted a regulation covering the same subject matter as the state regulation are both the clear manifestation of congressional preemptive intent and the

irreconcilable conflict between a state and federal regulation present which require preemption of the state regulation. 45 U.S.C. § 434; *N.Y.S. Dept. of Social Services v. Dublino*, 413 U.S. 405 (1973); *Florida Lime & Avocado Growers, supra.*

In addition to retaining the right to regulate subject matters on which the Secretary has not promulgated a rule, regulation, order or standard, states maintain authority to regulate within their borders, pursuant to a "local hazard" exception. Pursuant to § 434, states may regulate

> (2) Where the Secretary has promulgated a rule, regulation, order or standard covering the same subject matter or the State requirement and the regulation is:
>
> a) necessary to eliminate or reduce an essentially local safety hazard, and
>
> b) is not incompatible with any federal provision, and
>
> c) when not creating an undue burden in interstate commerce.

See, Donelon v. New Orleans Terminal Co., 474 F.2d 1108, 1112 (5th Cir. 1973), *cert. denied*, 414 U.S. 855 (1973).

The foregoing establishes that pursuant to § 434, state regulations will not be preempted when state regulation is necessary to reduce an essentially "local safety hazard," so long as said state regulation is not incompatible with any Federal law and does not place undue burden on interstate commerce. Although the FRSA recognizes that a state may continue in force an additional or more stringent law, rule, regulation, order, or standard relating to railroad safety to eliminate or reduce an essentially local hazard, some courts which have addressed the issue have failed to recognize that state common law may im-

pose such a greater standard. The common law of each state requires that railroads exercise reasonable care in warning of the approach of their trains. Haralson & Levine, *Grade Crossings and Train Speed: Preemption, Trial*, Feb. 1991, at 26. Even under the most stringent application of the FRSA's express preemption clause, the states can regulate because grade crossings pose unique local hazards. "The sheer number of possible factors renders nationally uniform safety standards for grade crossings impractical." *Id.* at 21.

The historical police powers of the states have always been jealously guarded against unwarranted intrusion by federal law particularly where, as here, the federal regulation provides no private right of action. Unlike common law, the FRSA was promulgated to promote rail safety, and provides no private right of action for individuals injured as a result of railroad negligence. Further, there is nothing in the FRSA to suggest that the regulations promulgated thereby establish anything other than minimum standards.

The current trend by railroads to seek total preemption, not only of state statutory law, but of state common law as well, is among the most invasive and egregious of violations to the sovereignty of the states and their efforts to protect their citizens.

D. § 434 Does Not Preempt State Common Law

This Court has repeatedly refused to void state statutes or regulations, absent congressional intent to preempt them.

> If Congress is authorized to act in a field, it should manifest its intention clearly. It will not be presumed that a federal statute was intended to supersede the exercise of the power of the state unless there is a clear manifestation to do so. The exercise of federal supremacy is not lightly to be presumed.

New York State Dep't of Social Services v. Dublino, 413 U.S. 405 (1973), quoting *Schwartz v. Texas*, 344 U.S. 199, 202-203 (1952). *See also, Pacific Gas and Electric v. State Energy Resources Conservation and Development Commission*, 461 U.S. 190, 206 (1983). The Court is especially reluctant to strike down state regulations when it would leave citizens unprotected while waiting for federal action. *See Hillsborough County, Florida v. Auto Med. Labs*, 471 U.S. 707, 105 S. Ct. 2371, 2376 (1985); *Kelly v. Washington*, 302 U.S. 1, 14-15 (1937). Any doubts as to whether federal regulation of a particular subject matter is the same as state regulation should be resolved in favor of the states. *Chevron U.S.A., Inc. v. Hammond*, 726 F.2d 483, 487-488 (9th Cir. 1984), *cert. denied*, 105 S. Ct. 1686 (1985). Where, as here, a state's police power is involved, federal preemption is not to be presumed. *Chrysler Corp. v. Tofany*, 419 F.2d 499, 511 (2d Cir. 1969); *Chrysler Corp. v. Rhodes*, 416 F.2d 319, 324 n.8 (1st Cir. 1969).

This court has discussed the scope of federal preemption as it relates to state common law actions in two recent cases. In *English v. General Electric Co.*, 496 U.S. 72, 110 S. Ct. 2270 (1990), the Court addressed whether a petitioner's state-law tort claim for intentional infliction of emotional distress was preempted by particular sections of the Energy Reorganization Act or the Atomic Energy Acts which provided specific guidelines for whistleblower protection, including specific remedies. The question presented was whether the failure of federal remedial statutes to allow for recovery of punitive damages by whistleblowers would bar such recovery under a state common law claim. 496 U.S. at 89. The Court noted that where a field which Congress is said to have preempted includes areas that have been traditionally occupied by states, congressional intent to supersede state laws must be clear and manifest. *Id.* at 79. This holding is equally appropriate when determining whether the Secretary has expressly regulated subject matter preempting

state law pursuant to § 434. The regulations relied on by petitioner simply do not amount to clear and manifest intent to supersede state common law. Preemption of state common law is inappropriate in the present case.

This Court, concluding that the state common law claim allowing for punitive damages was not preempted, reiterated its teaching that "[o]rdinarily, state causes of action are not preempted solely because they impose liability over and above that authorized by federal law." *Id.*, citing *California v. ARC America Corp.*, 490 U.S. 93, 104, 109 S. Ct. 1661 (1989). This Court recognized in that case that not every state law that in some remote way may affect the decisions of those who build and run nuclear facilities can be said to fall within the preempted field. Similarly, as indicated in the proceedings below, "Allowing tort suits to go forward against railroad companies simply does not affect (or at best only tangentially affects) the provision of federal aid to the states to help them build better railroad grade crossings." *Easterwood*, 933 F.2d at 1555.

In *Gade v. National Solid Waste Management Ass'n*, —— U.S. ——, 112 S. Ct. 2374 (1992), this Court reiterated the fact that preemption analysis cannot ignore the effect of challenged state action on the preempted field. whatever the purpose or purposes of state law, and stated that "the key question is thus at what point the state regulation sufficiently interferes with federal regulation that it should be deemed pre-empted. . . . *Id.* at 2387. Regarding grade crossings, the regulations enacted pursuant to the Federal-Aid Highway and the Federal Highway Safety Act are *de minimis* and clearly not tailored to address the hazards associated with grade crossings. These regulations merely provide funds and comprise minimal guidelines within which state crossing apparati must fit to qualify for the use of said funds. The petitioner's suggestion that a common law statute

holding the carrier to reasonable standards of care with respect to the maintenance of these crossings in any way contravenes said federal regulations is without merit.

Citing *English*, *supra*, this Court noted that a state tort law claim was not preempted by a federal regulation where it did not have a direct and substantial effect on the federal scheme in issue. This Court added that state laws of general applicability that do not conflict with the federal regulatory scheme and that are generally applicable to all individuals, are not generally preempted. *Id.* at 2387-88. Although the Court noted that a state law cannot be saved merely because the state can express some statewide application, the state law is not preempted if it does not directly, substantially, and specifically regulate the federally regulated subject matter.

State tort claims at issue are precisely the type of generally applicable laws identified by this Court in *Gade*, and in no way directly, substantially regulate where the Secretary has allegedly regulated.

E. State Regulation of Grade Crossings Has Not Been Preempted Pursuant to § 434

1. *The Secretary Has Not Regulated the Subject Matter of Grade Crossings*

As previously indicated the federal highway regulations which petitioner seeks to rely on as preempting the subject matter of grade crossings are limited to the identification and prioritization of grade crossings and to the funding of upgrades with respect to the most hazardous crossings. 23 U.S.C. § 130. The forgoing funding scheme for grade crossing improvements is a far cry from the type of federal regulation which might preempt state administrative law on the subject much less state common law. It cannot be said that the subject matter of grade crossings have received any federal regulation whatsoever.

2. *There Is a Long History of Federal Nonfeasance Regarding the Safety Regulation of Grade Crossings*

As correctly stated in the respondent/cross-petitioners Response to Petition for Certiorari, the legislative history reveals that Congress' concern with railroad crossing safety has been limited to the study of the grade crossing problem and providing federal funds therefor. Respondent/cross-petitioner's Response to Petition at 5-7. A closer look indicates that the Secretary has failed to take any significant action even in regard to the studying and funding directed by Congress.[5]

Enacting the Federal Railroad Safety Act of 1970, Congress directed the Secretary of Transportation to "submit to the President . . ., within one year after October 16, 1970, a comprehensive study of the problem of eliminating and protecting railroad grade crossings, . . . together with his recommendations for appropriate action including, if relevant, a recommendation for equitable allocation of the economic costs of any program proposed as a result of such study." 45 U.S.C. § 433. Despite this congressional directive in the original language of the FRSA, the Federal Railroad Administration failed to address adequately key issues associated with grade crossing hazards, including train visibility and grade crossing warning systems.[6] After 18 years of FRA inac-

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[5] In fact, the action which allegedly invokes § 434 herein is not taken directly by the Secretary but is taken by state officials and attributed to the Secretary based on a far-reaching notion of delegated authority.

[6] One such example of FRA inaction involved FRA consideration of the need for visibility lights on trains or at crossings. In 1983 the FRA concluded a rulemaking action regarding the need for locomotives to be equipped with lights to alert motorists to approaching trains. Despite record evidence which indicated that lights would be cost beneficial, the FRA concluded, based on a report issued by the Association of American Railroads (hereinafter "AAR"), that "there is no evidence in the available data that alerting lights are

tion, Congress acted again in section 23 of the Rail Safety Improvement Act of 1988 (Pub. L. 100-342), directing that "The Secretary shall, within one year after the date of enactment of the Rail Safety Improvement Act of 1988, issue such rules, regulations, orders, and standards as may be necessary to ensure the safe maintenance, inspection, and testing of signal systems at railroad highway grade crossings." 45 U.S.C. § 431(q). Despite the explicit congressional directive that the Secretary promulgate regulations and despite the incontrovertible evidence of the hazards associated with grade crossings, the FRA, in keeping with its history of inaction, "determined that a need exists for more accurate factual information in order to determine the extent of Federal involvement in establishing requirements for periodic maintenance, inspection, and testing of active crossig warning systems." Grade Crossig Signal System Safety, 49 CFR Part 234, 56 Fed. Reg. 33722 (1991). The FRA's Final Rule, issued more than two years after the deadline set by Congress, amounted to no more than an exercise in information gathering imposed on the railroads. Further, the rule applied only to *active* crossing signal systems, whereas nearly two-thirds of the nation's 176,572 rail-highway intersections have passive warning systems such as crossbucks; passive warning systems have no lights or bells to warn of oncoming trains, and no gates.

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effective in reducing grade crossing accidents." 48 Fed. Reg. 20257. The FRA, relying on the AAR report, noted that "As in the case with any complex statistical analysis, reasonable minds might differ with certain of the assumptions that were made by the AAR in comparing and analyzing data . . .," and further concluded that "[E]ven assuming that alerting lights were effective to some degree, that alone would not warrant Federal regulation to require them as opposed to other alternatives." *Id.* The rulemaking was terminated by the FRA and no further action was taken.

Interestingly, the Administrator of the FRA at that time, Robert W. Blanchette, is currently the Vice-President and General Counsel for the AAR, whose report provided the basis for terminating the FRA rulemaking regarding safety lights.

To date, the FRA has taken no action to regulate the requirement of standards regarding maintenance, inspection, and testing of active crossing warning systems. The FRA is still collecting, in their words, "more accurate factual information in order to determine the extent of Federal involvement in establishing requirements for periodic maintenance, inspection, and testing of active warning systems." Now, a full four years after initially directing the FRA to take action to establish said requirements, Congress has once again demanded action. The passage of Pub. L. 102-365, took away the Secretary's discretion regarding the issuance of rules regulations orders and standards to ensure the safe maintenance, inspection and testing of signal system and devices at railroad highway grade crossings. The Secretary's history of inaction in the matter of grade crossing safety, and Congress' recent responses thereto, are a clear testament to the fact that the Secretary has not yet regulated grade crossings as anticipated by the Federal Railroad Safety Act from which the petitioners seek to invoke preemptive power. To suggest, as the petitioner has, that there are any federal regulations addressing the safety aspects of the grade crossing problem is simply without merit.

CONCLUSION

For the foregoing reasons the judgment in 91-790 should be affirmed.

Respectfully submitted,

LAWRENCE M. MANN
STEVEN M. WEISBAUM
ALPER & MANN, P.C.
400 N. Capitol Street, N.W.
Suite 851
Washington, D.C 20001
(202) 298-9191

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